Supreme Court, U.S.
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No. 99-159

IN THE

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a trial court's interlocutory discovery order pursuant to California's statutory crime-fraud exception to the attorney-client privilege was decided and enforced in a manner that deprives a litigant of its due process rights to counsel and access to the courts.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding. Respondent Montrose Chemical Corporation of California has two fifty percent shareholders, Stauffer Management Company (which is not publicly traded) and Chris-Craft Industries, Inc. (which is publicly traded).

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Appendix — Transcript Of Proceedings Of The Superior Court Of The State Of California For The County Of Los Angeles Dated November 4, 1998 . . . . . 1a

Respondent Montrose Chemical Corporation of California ("Montrose") respectfully requests this Court to deny the petition for writ of certiorari in this case for the reasons set forth herein.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the application of the crime-fraud exception to the attorney-client privilege, codified in California as Evidence Code Section 956, which provides in relevant part that "[t]here is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Petitioner American Motorists Insurance Company ("AMICO") also relies upon the Fifth Amendment and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

AMICO's petition for a writ of certiorari is driven by a thinly veiled disagreement with the application and enforcement of California law. Based upon overwhelming evidence, on December 11, 1998, the trial court concluded that a *prima facie* showing of fraud sufficient to pierce the attorney-client privilege under California Evidence Code § 956 was established. *See* Appendix to the Petition for Certiorari at 6a-11a ("Pet. App."). To protect AMICO's legitimate interests, and to ensure that only documents reasonably related to AMICO's ongoing fraud are disclosed to Montrose, the trial court directed petitioner to submit the documents for the trial court's *in camera* review.

The trial court's discovery order was entered in an insurance "bad faith" action, which Montrose was forced to initiate as a result of AMICO's bad faith failure to defend Montrose in a number of environmental and toxic tort lawsuits.[1] In the course of the bad faith lawsuit, Montrose discovered that AMICO's misconduct was not limited to its bad faith failure to defend Montrose, but also extended to fraud (with the assistance of counsel) in asserting that Montrose was not an insured. This discovery of AMICO's fraud in asserting the "named insured" defense through the use of its legal counsel led to the filing of Montrose's fraud motion, and the trial court's discovery order which is the subject of AMICO's certiorari petition.

Well over a month after the trial court announced its ruling on the crime-fraud motion, AMICO asked the trial court to stay its order — which would bring the bad faith case to a standstill — pending final resolution of appeals AMICO filed disputing duty to defend orders entered in the underlying insurance coverage cases, *Canadian II* and *Canadian III*.[2] The trial court previously had denied an

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1. The bad faith action, entitled *Montrose Chemical Corp. of California v. American Motorists Ins. Co., et al.*, Los Angeles Superior Court Case No. BC 130486, was filed against AMICO and two other carriers. Montrose has settled its dispute with the other two defendants, The Travelers Indemnity Company and Insurance Company of North America, and has dismissed the action against them with prejudice. AMICO is the sole remaining defendant, and trial is set for November 8, 1999.

2. AMICO's failure to defend Montrose forced Montrose into a series of coverage lawsuits in Los Angeles County Superior Court: *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al.*, Case No. C 594148, consolidated with Case

(Cont'd)

identical stay motion in 1996, and AMICO made no attempt to argue for reconsideration of that prior ruling in accordance with California Code of Civil Procedure Section 1008. Given this previous denial of a stay, and because a stay was even less appropriate now, on January 13, 1999, the trial court summarily denied AMICO's renewed stay motion so that AMICO could seek appellate review of that order along with the December 11 Order within the 40-day time period set forth in the December 11 Order. Pet. App. at 12a-13a.

AMICO's petition for writ of mandate, challenging the December 11, 1998 crime-fraud order and the January 13, 1999 order denying AMICO's renewed stay motion, was summarily denied without an opinion by the Court of Appeal on February 19, 1999. Pet. App. at 2a. On March 1, 1999, AMICO filed its petition for review of the California Court of Appeal's summary denial of its petition for writ of mandate with the California Supreme Court. On April 21, 1999, the California Supreme Court summarily denied AMICO's petition for review without a written opinion. Pet. App. at 1a. AMICO now seeks to invoke the jurisdiction of this Court to review an interlocutory decision that rests on a fact-specific application of the state law of California.

B. Factual Background

Commencing in the early 1980s, Montrose became a target of numerous third party liability claims resulting from Montrose's manufacture of DDT, a pesticide and anti-

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No. C 597389 ("*Canadian I*") (Ashmann, J.); *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al.*, Case No. BC 005158 ("*Canadian II*") (Kalin, J.); and *Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al.*, Case No. BC 077158 ("*Canadian III*") (Kalin, J.).

malarial agent. Faced with alleged liability, Montrose turned to AMICO and other carriers for a defense. In order to avoid its defense obligation, AMICO claimed that Montrose was not an insured entitled to coverage under the AMICO policies.[3] The courts in the three coverage cases — *Canadian I*, *Canadian II*, and *Canadian III* — have resoundingly rejected this argument, and have repeatedly granted Montrose's motion for summary adjudication finding that Montrose is a "named insured" under the AMICO policies as a matter of law.[4] AMICO's steadfast refusal to defend Montrose despite numerous trial, intermediate appellate and Supreme Court orders to defend led to the filing of the bad faith lawsuit against AMICO.

As discovery unfolded in the bad faith case, Montrose discovered evidence that AMICO knowingly asserted its

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3. The AMICO policies refer to the three policies that AMICO wrote for Montrose's former 50% shareholder — the Stauffer Chemical Company — and that covered Stauffer's "owned or controlled subsidiaries or affiliated companies or corporations now existing or hereinafter created. . . ."

4. After the trial court summarily adjudicated in *Canadian II* and *Canadian III* that Montrose is a "named insured" under the AMICO policies in October of 1997, AMICO filed a writ petition with the Court of Appeal seeking review of that decision. AMICO's writ petition on the "named insured" summary adjudication was denied, as was AMICO's petition for review to the California Supreme Court. Accordingly, in 1998, the trial court reinstated prior orders directing AMICO to defend Montrose in the underlying cases at issue in *Canadian II* and *Canadian III*. AMICO's current appeals are not from the "named insured" ruling, but from these subsequent orders in *Canadian II* and *Canadian III*, setting forth the procedure for AMICO to follow in defending the underlying environmental cases. It is in these pending appeals that AMICO claims the trial court has denied it the right to counsel and access to the courts.

"named insured" defense fraudulently, invoking the assistance of counsel to further its fraud. Accordingly, in October of 1998, Montrose filed its initial discovery motion to compel production of AMICO's privileged and non-privileged documents and testimony relating to the "named insured" issue under California's fraud exception to the attorney-client privilege, Evidence Code Section 956.

The briefing and hearing process that followed was exhaustive: AMICO filed an opposition and a surreply in response to Montrose's reply brief, and the trial court heard oral argument on three hearing days, October 28, November 3, and November 4, 1998.[5] At the conclusion of these hearings, the trial court retired to consider the matter further. The court announced its ruling orally on November 23, 1998, and issued a written minute order embodying that ruling on November 24, 1998. Pet. App. at 3a-5a. After considering proposed orders submitted by both sides, and AMICO's objections to Montrose's proposed order, the trial court entered a formal written order on December 11, 1998, finding "strong" evidence supporting a *prima facie* showing of AMICO's fraud, based on multiple indicia of fraud. To shield any work product documents or documents relating to litigation strategy, the trial court required AMICO to submit its documents for *in camera* review.

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5. As a factual predicate to considering the fraud motion, the trial court first heard lengthy argument on October 28 and November 3, 1998 on Montrose's supplemental motion to compel compliance with the court's prior order compelling AMICO to produce additional documents, which had not been produced, and many of which would specifically demonstrate AMICO's knowledge and documentation of the coverage afforded to the various corporate entities insured under the Stauffer insurance program, including Montrose.

C. Decisions Below

Although AMICO neglects to even mention it, the trial court's order was based upon California Evidence Code Section 956 and case law construing California's statutory exception to the attorney-client privilege. The trial court's fact-specific construction and enforcement of California's crime-fraud exception to the attorney-client privilege is unassailable. To invoke the crime-fraud exception under Section 956, the moving party must establish its *prima facie* case by presenting evidence from which a reasonable inference of fraud can be drawn. *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1262 (1988); *Nowell v. Superior Court*, 223 Cal. App. 2d 652, 657 (1963). The elements of fraud necessary to establish the exception are: (1) a misrepresentation of material fact; (2) knowledge of the representation's falsity; (3) intent to deceive; and (4) the right to rely on the representation. *BP Alaska*, 199 Cal. App. 3d at 1263.[6] Applying this standard, the trial court concluded that there was "strong" evidence that AMICO committed fraud in asserting the "named insured" defense, using the offices of its counsel, and therefore waived its attorney-client privilege.

The scope of the privilege waiver resulting from the trial court's finding of "strong" evidence of fraud is described in the *BP Alaska* decision: *all privileged documents reasonably*

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6. An insured has the right to rely on its insurer's truthfulness and assertions. *See, e.g., Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1414 (S.D. Cal. 1994) (right to rely on representations made between insured and insurer). Since Evidence Code Section 956 does not require a completed crime or fraud, no actual reliance or damages must be shown or proven. *BP Alaska*, *supra*, 199 Cal. App. 3d at 1262-63.

related to the ongoing fraud are discoverable. Id. at 1269 ("The documents in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime-fraud exception"); *id.* at 1271 ("communications reasonably related to the fraud are discoverable"). In implementing this standard, if the party from whom production is sought "honestly believes one or more of the documents contain clearly unrelated material, the documents could be reviewed in camera and the irrelevant matter excised." *Id.* at 1269-1270.[7]

Since the crime-fraud exception to the attorney-client privilege applies if the privileged material reasonably relates to the subject matter of the ongoing fraud (*BP Alaska*, 199 Cal. App. 3d at 1269-1271; *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. at 1415), the trial court properly required AMICO to submit *in camera all* documents relating to its ongoing fraud in asserting the "named insured" defense, regardless of whether they were prepared in connection with the bad faith action or the appeals in the coverage actions. In accordance with California law, the trial court recognized that the subject matter of the fraud delineates the scope of the waiver, and found that any documents relating to the "named insured" issue which were prepared in connection with the bad faith action and the pending appeals regarding the duty to defend orders in *Canadian II* and *Canadian III* may reasonably relate to the ongoing fraud. *See* Pet. App. at 18a, 19a and 21a.

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7. *See also Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. at 1415 (under California law, crime-fraud exception requires disclosure of attorney-client communications made in one year, where client used attorney's services in following year to help perpetrate ongoing fraud).

Well over a month after the trial court announced its decision regarding the fraud exception to the attorney-client privilege, AMICO requested that the trial court stay its order until the pending appeals of the duty to defend orders in *Canadian II* and *Canadian III* are finally resolved. AMICO's prior stay motion had been denied, and AMICO made no attempt to satisfy the requirements for reconsideration under California Code of Civil Procedure Section 1008 when it requested a stay that would have brought the bad faith action to a standstill on the eve of trial. On January 13, 1999, the trial court summarily denied AMICO's renewed stay motion, allowing AMICO to seek appellate review of that decision along with the crime-fraud order.

Under the December 11 Order, AMICO was required to produce all documents relating to the "named insured" issue for *in camera* review within forty days of entry of the order, unless the order was stayed by AMICO's California appellate writ review. Since AMICO's certiorari petition for review was summarily denied by the California Supreme Court on April 21, 1999, AMICO was obligated to produce the documents on June 1, 1999. Instead, AMICO attempted to avoid its obligations by moving *ex parte* for an order that it does not have to turn over to Montrose any formerly privileged documents until this Court decides whether to grant AMICO's certiorari petition. The trial court denied AMICO's request, and AMICO did not request a stay from this Court.[8] To date, AMICO still has not provided all

8. As the Court is aware, neither the filing nor the granting of a petition for a writ of certiorari operates as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court. *See* 28 U.S.C. § 2101(f). Nor would AMICO's request that this Court stay an interlocutory discovery (Cont'd)

documents to the trial court as ordered. AMICO has simply attempted to cure its noncompliance by making a token submission of documents.

REASONS FOR DENYING THE WRIT

In light of the overwhelming evidence of fraud, and because AMICO utilized counsel in perpetrating this fraud, the trial court concluded that AMICO waived any attorney-client privilege attached to documents relating to the "named insured" issue. This decision rests on a fact-specific application of the law of California and raises no issue appropriate for review by this Court.

Although AMICO invokes the rhetoric of due process in an attempt to manufacture Supreme Court jurisdiction, the proceedings below demonstrate that the trial court has implemented all available procedural safeguards to protect AMICO's legitimate interests, in both the bad faith action and the pending appeals in the separate coverage actions regarding the duty to defend orders. To that end, the trial court gave AMICO ample opportunity to respond to the evidence presented by Montrose in support of the fraud motion, allowing AMICO to submit an opposition and a surreply to Montrose's reply brief, and present oral argument

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order have been warranted. *See, e.g., Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, 479 U.S. 1312 (1986) (only the execution or enforcement of final, as opposed to interlocutory, orders may be stayed to enable aggrieved party to obtain writ of certiorari from Supreme Court); *Bateman v. Arizona*, 429 U.S. 1302, 1304 (1976) (single Justice of the Court will only stay a state decision which the lower court refused to stay where a "demonstration of compelling necessity" has been made).

regarding this issue during multiple hearing days. After taking the motion under submission and carefully considering the matter, the trial court concluded that Montrose had met its burden of making a *prima facie* showing that AMICO utilized its counsel to fraudulently assert that Montrose was not an insured under the relevant AMICO policies. The trial court's order protects AMICO's rights completely by ordering *in camera* review of the documents, rather than direct production to Montrose. The court's order protects AMICO's work product and litigation files, and the trial court has the ability to redact or withhold from production any documents that would prejudice AMICO's litigation of its appeals. Under these circumstances, where the trial court has made every effort to protect AMICO's legitimate interests, AMICO's claim that it has been deprived of due process is absurd.

Equally unfounded is AMICO's claim that the trial court is enforcing its order in an attempt to insulate from appellate scrutiny the correctness of the "named insured" rulings, consequently depriving AMICO of its right to counsel and right of access to the courts in challenging those "named insured" rulings. First, AMICO mischaracterizes the nature of the pending appeals. AMICO's current appeals are not from the trial court's decision in October of 1997 granting Montrose's summary adjudication motion, and finding that Montrose is a "named insured" as a matter of law. AMICO's challenges regarding this "named insured" summary adjudication were denied by the California Court of Appeal and California Supreme Court. The trial court then reinstated prior orders directing AMICO to defend Montrose in the underlying environmental cases at issue in *Canadian II* and *Canadian III*, setting forth the procedure for AMICO to follow in defending the underlying actions. AMICO's current appeals are from these subsequent duty to defend orders.

Moreover, AMICO distorts the facts to make it appear as though the correctness of the trial court's ruling regarding the applicability of the crime-fraud exception to the attorney-client privilege somehow depends upon the outcome of the pending appeals. AMICO asserts that the rulings which are being challenged in the pending appeals form the very foundation for the trial court's crime fraud order, and that the trial court should therefore stay enforcement of the December 11 Order because the appellate court may conclude that there is a triable issue of fact regarding Montrose's status as a "named insured." A determination by the California Court of Appeal that a triable issue of fact exists regarding the "named insured" issue, however, would not undermine the trial court's order regarding the applicability of the crime-fraud exception to the attorney-client privilege. AMICO completely overlooks the distinction between a *prima facie* showing of fraud (which the trial court found) and an actual finding of fraud (which remains to be determined). The trial court ruled that a *prima facie* showing of fraud sufficient to vitiate the attorney-client privilege under California law had been established, but left the ultimate determination of actual fraud for the jury. *See* Pet App. at 9a ("The ultimate determination of the above evidence offered by Montrose will be for the jury to decide. However, for purposes of discovery motions the Court can conclude that there are strong reasonable inferences of the above as being factual so as to constitute waiver of the attorney-client privilege"). Consequently, a ruling that there is a triable issue of fact regarding Montrose's status as a "named insured" in the pending appeals (although unlikely) would be entirely consistent with the proceedings in the bad faith action, where a triable issue of fact remains regarding whether AMICO

actually committed fraud in asserting the "named insured" defense with the assistance of counsel.[9]

In any event, AMICO has exercised its right to counsel and corresponding right of access to the courts during its writ petition to the California Court of Appeal and petition for review to the California Supreme Court. Since the California appellate courts denied AMICO's writ petition and petition for review, affirming the trial court's finding of "strong" evidence of *prima facie* fraud, AMICO has had its day in the appellate courts on this issue and the disclosure of privileged documents does not result from a deprivation of due process — it results from AMICO's own conduct which waived the privilege.

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9. *See, e.g., Grace v. Ins. Co. of North America*, 944 P.2d 460, 468, n.18 (Alaska 1997) ("While an issue of fact remains as to whether this settlement actually was the product of fraud, the evidence is sufficient to present a prima facie case of fraud"); *BP Alaska*, 199 Cal. App. 3d at 1262-1263 ("Evidence Code section 956 does not require a completed crime or fraud. It applies to attorney communications sought to enable the client to plan to commit a fraud, whether the fraud is successful or not. *Moreover, we are not reviewing the merits of a fraud cause of action . . . but rather we are reviewing the merits of a discovery order to determine if [the proponent of the crime fraud exception] will have access to communications between [the opposing party] and its attorneys to aid [the proponent] in proving its causes of action*") (emphasis added). *See also In re Feldberg*, 862 F.2d 622, 625-626 (7th Cir. 1988) (describing the reviewing court's role as determining whether the evidence calls for inquiry regarding the applicability of the crime-fraud exception, not whether it supports a verdict).

I.

THIS COURT LACKS JURISDICTION TO REVIEW THE TRIAL COURT'S RULING

A. The Judgment Below Is Interlocutory And Not "Final" For Purposes Of Supreme Court Review

This Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest state court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This Court lacks jurisdiction to review the decision below because an interlocutory discovery order by the trial court regarding the applicability of the crime-fraud exception to the attorney-client privilege is not a "final" order within the meaning of 28 U.S.C. § 1257.

The general rule is that, to be reviewable, the state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Jefferson v. City of Tarrant, Alabama*, 118 S. Ct. 481, 485-486 (1997) (*quoting Market Street R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551 (1945)). The decision below is not "final" in either required sense — the trial court's order is simply an interlocutory discovery order regarding Montrose's motion to compel privileged and non-privileged documents and testimony pursuant to the crime-fraud exception to the attorney-client privilege. Far from being an effective determination of the litigation, the trial court's decision merely resolves one discovery dispute between the parties regarding the existence and scope of a

litigant's waiver of the attorney-client privilege. The trial court's order does not resolve the entire litigation, nor does it even resolve a portion of the case. A trial on the merits still remains regarding AMICO's bad faith liability and the question of whether AMICO has engaged in fraud in asserting its "named insured" defense. *See, e.g., Jefferson v. City of Tarrant, Alabama*, 118 S. Ct. at 486 (decision of state supreme court was not final where it answered a single certified question that affected only two of four counts in complaint and remanded case for further proceedings including probable trial on merits of state law claims).[10]

Although this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), identified four categories of cases in which a judgment is final even though further proceedings are pending in the state courts, the present case does not fit into any identified exceptional category. AMICO concedes that this case does not fall within three of the four exceptional categories, but contends that this case fits within the third category of cases: "[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In each of the cases cited as falling within this exception, the party seeking review of the federal question

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10. *See also Cunningham v. Hamilton County*, 119 S. Ct. 1915 (1999) (trial court's discovery order is interlocutory and is not a "final judgment" within appellate court jurisdiction); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation' ") (citation omitted); *Collins v. Miller*, 252 U.S. 364, 370 (1920) (expressly holding that a judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved").

might prevail on other grounds and thereby lose the opportunity for review because the issue is moot, or might lose on other grounds but be prevented by state law from seeking review.[11] The present case falls outside this category since further proceedings on the merits remain, and AMICO can pursue appellate review following a final judgment in that action. *See, e.g., Flynt v. Ohio*, 451 U.S. 619, 621-622 (1981) (holding that the judgment was not final within any of the four exceptions identified in *Cox* and finding that review "can await final judgment without any adverse effect upon important federal interests" despite publisher's claims that prosecution violated both the First and Fourteenth Amendments); *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981) (declining to address the constitutional issues "until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record").

AMICO's remaining argument — that this Court should disregard the requirement of finality because the trial court's order immediately deprives AMICO of its right to counsel and access to the courts while the appeals in the coverage actions are pending (Pet. at 9) — is specious. First, the trial court's order adequately protects AMICO's rights in the pending appeals by requiring AMICO to submit the documents *in camera* rather than directly to Montrose. The trial court can then excise material that falls outside the scope

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11. For example, in *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966), the California Supreme Court ordered retrial of a criminal defendant on the ground that his confession had been improperly admitted. If he were again convicted, the federal question of the admissibility of the confession would be mooted, whereas if he were acquitted, state law precluded the State from seeking review of the acquittal.

of the waiver and that would prejudice AMICO's litigation of its appeals. Second, rather than being deprived of its right to prosecute the pending appeals, AMICO has pursued its appeals (which are now scheduled to be argued on August 24, 1999) while evading its obligation to disclose all the documents which should have been produced as of June 1, 1999, including documents prepared in connection with the pending appeals that relate in any way to the "named insured" issue. If this Court accepted review of a state decision every time a litigant asserted that its rights were being immediately impeded, the Court would be required to read the finality requirement completely out of the statute. *See, e.g., Flynt v. Ohio*, 451 U.S. at 622 (declining to adopt an expansive construction of the exceptions in *Cox* that would "swallow the rule" requiring a final judgment).[12]

As this Court has stated, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

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12. Moreover, an order to compel production of attorney-client privileged documents is *not* an exception to the rule that interlocutory judgments are non-appealable even though the aggrieved party claims irreparable harm from forced disclosure. *See, e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 749-750 (10th Cir. 1993) ("The practical consequences of the district court's decision on the controversy . . . can be effectively reviewed on direct appeal following a judgment on the merits. If [the appellate court] determines that privileged documents were wrongly turned over to the plaintiffs. . . , we can reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed documents. . . . [I]n virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take jurisdiction. . . . '[E]ven orders to produce information over strong objections based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone' ").

Jefferson v. City of Tarrant, Alabama, 118 S. Ct. at 486 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Because the decision below is merely an interlocutory discovery order that does not fall within any of the exceptional categories in *Cox*, this Court lacks jurisdiction to review the trial court's order.

B. The Judgment Below Rests Solely Upon An Adequate And Independent State Ground

It is undoubtedly "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). In the present case, the trial court's judgment was based entirely upon well-established California privilege law, which requires the disclosure of privileged attorney-client communications once a *prima facie* showing of fraud is established. *See* Pet. App. at 7a ("Montrose's Motion to compel production of AMICO's named insured documents' [sic] privileged and non-privileged related documents and testimony is granted under the fraud exception to the attorney-client privilege"). Moreover, AMICO's own arguments (both written and oral) in opposition to Montrose's fraud motion were based entirely on California law.[13]

13. For example, AMICO's opposition to Montrose's fraud motion cites to only two cases: *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240 (1988), which construed California Evidence Code Section 956, and *St. Paul Fire & Marine Ins. Co. v. T.M. Coss*, 80 Cal. App. 3d 888 (1978), which was simply cited for a proposition regarding insurance coverage. During the (Cont'd)

In *Coleman v. Thompson*, 501 U.S. 722, 728 (1991), the Court reaffirmed that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *See also Harris v. Reed*, 489 U.S. 255, 262 (1989). Although the Court developed a presumption in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), that where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so,"[14] *Coleman* made it clear that this presumption only applies in limited cases where certain conditions precedent are met.

(Cont'd)
hearing on Montrose's fraud motion, there were numerous references, by both the trial court and the parties, to California case law construing the crime-fraud exception to the attorney-client privilege. *See, e.g.*, November 4, 1998 Transcript of Proceedings, set forth in the appendix to this brief ("Resp. App.") at 2a ("Trial Court: Okay, there are — obviously, the first area that the court has to consider is whether there's a prima facie case for a fraud, and, of course, BP Alaska sets out the four prongs of that, and the court — and I'm sure I'll hear argument on this"); *id.* at 3a-14a (counsel for Montrose analyzing the applicability of the crime-fraud exception under Evidence Code Section 956 and California law); *id.* at 15a-30a (counsel for AMICO analyzing the applicability of the crime-fraud exception under Evidence Code Section 956 and California law).

14. This presumption can be overcome by a "plain statement in [the state's] judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. at 1041.

> The presumption . . . applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. In the rest of the cases, there is little need for a conclusive presumption.

501 U.S. at 739-740; *id.* at 735 ("A predicate to the application of the . . . presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law").

The state court's decision at issue in the present case neither discussed nor purported to decide any federal claim, and there is no reasonable basis for concluding that the decision rested primarily on federal law. Thus, the condition precedent required for invocation of the "plain statement" rule simply does not exist.[15]

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15. The state court decision does not fairly appear to rely on federal law, nor is it interwoven with federal law, such that the state court evidently felt compelled by federal law to rule in the manner it did. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 625 (1989) (Court exercised jurisdiction over state decision where state court focused solely on federal statutes and felt bound by construction adopted in this Court's prior decisions). Rather, the state court's disposition of the matter was solely based upon California's statutory exception to the attorney-client privilege. To the extent that AMICO's petition simply rests on an argument that the trial court misapplied or misconstrued a California statute, such allegations do not provide a basis for this Court's review. *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938) (decisions which simply "concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes" are not reviewable).

This case stands in stark contrast to other cases where the state courts had expressly discussed and decided the merits of the federal claims, providing some basis in logic for applying the "plain statement" rule. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 36 (1996) (Supreme Court had jurisdiction where opinion clearly relied upon federal law, citing almost exclusively to federal cases); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (state ground not "independent" where state court expressly rejected merits of federal claim and then applied default rule which was totally "depend[ent] on an antecedent ruling on federal law"); *Massachusetts v. Upton*, 466 U.S. 727 (1984) (Court reviewed a state decision that relied solely on an interpretation of the Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983)).

In addition, the summary orders by the California Court of Appeal and the California Supreme Court denying AMICO's writ petition and petition for review also did not address the merits of AMICO's federal claims, which were merely asserted as an afterthought following the trial court's ruling finding "strong" evidence supporting a *prima facie* showing of fraud. Addressing the issue of unexplained orders in the context of a habeas corpus proceeding, this Court held that it will look to the last reasoned opinion and will not presume that a later unexplained decision silently disregarded the earlier decision and considered the merits of the federal claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991) ("The maxim is that silence implies consent, not the opposite — and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect — which simply 'looks through' them to the last reasoned decision —

most nearly reflects the role they are ordinarily intended to play") (emphasis in original).[16]

II.

THE TRIAL COURT PROPERLY FOUND THAT AMICO WAIVED ITS ATTORNEY-CLIENT PRIVILEGE, AND DENIED AMICO'S RENEWED REQUEST TO STAY THE CASE, IN A MANNER THAT DOES NOT RAISE ANY CONSTITUTIONAL QUESTIONS

AMICO's entire petition for writ of certiorari is premised upon AMICO's dissatisfaction with the way in which the trial court construed and enforced Evidence Code Section 956. A review of the decision below, however, reveals that the trial court applied settled California privilege law, and entered a carefully-considered and well-supported ruling that AMICO's privileged communications were subject to *in camera* review under the crime-fraud exception to the attorney-client privilege.

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16. In addition, this Court has held that if no opinion was written and it appears that the judgment might have rested upon a nonfederal ground, the Court will not take jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *see also Stembridge v. Georgia*, 343 U.S. 541, 547 (1952) ("Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment"); *Lynch v. New York*, 293 U.S. 52, 54 (1934) ("It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it").

Upon finding "strong" evidence to support a *prima facie* showing that AMICO is engaging in ongoing fraud in asserting its "named insured" defense, the trial court did not require AMICO to turn over privileged documents to its adversary. Rather, to protect AMICO's interests, the trial court allowed AMICO to submit the documents *in camera* so that the trial court could shield AMICO's work product documents, as well as documents relating to trial or appellate strategy. In this manner, the trial court could ensure that only documents reasonably related to AMICO's ongoing fraud are disclosed to Montrose.

Despite the trial court's efforts to ensure that AMICO's interests are properly safeguarded, AMICO alleges that the trial court has enforced its order to purposefully deprive AMICO's due process rights to counsel and of access to the courts. Again, AMICO's allegations merely arise from its disagreement with the trial court's construction and enforcement of California privilege law. Once the trial court found that Montrose met its burden of establishing a *prima facie* showing of fraud, the trial court had the power to require AMICO to submit any documents that fall within the subject matter of the fraud for *in camera* review, including documents prepared in connection with the pending appeals. The trial court was not required to grant AMICO's renewed motion to stay enforcement of the December 11 Order, especially because AMICO's prior stay motion was denied and AMICO made no effort to satisfy the requirements for reconsideration under California Code of Civil Procedure Section 1008. More importantly, however, AMICO's allegations that the trial court has denied AMICO due process simply by enforcing its order are frivolous.

AMICO has neither been denied its right to counsel nor its right of access to the courts. First, AMICO in fact *has already had immediate and direct access to the appellate courts* through its petition for writ of mandate and petition for review challenging the trial court's fraud order. AMICO has had its day in the appellate courts, and the courts have denied AMICO's writ petition and petition for review, affirming the trial court's finding of "strong" evidence of *prima facie* fraud. In light of these facts, AMICO's contention that the trial court has "insulated" its orders from scrutiny is demonstrably false. Contrary to AMICO's assertions, the disclosure of formerly privileged information does not result from the trial court's purposeful denial of AMICO's due process rights, it merely results from AMICO's own conduct which *waived* the attorney-client privilege relating to the "named insured" issue.

Second, AMICO's due process rights to counsel and access to the courts are being protected completely by the trial court's *in camera* review of the documents. *See, e.g., BP Alaska*, 199 Cal. App. 3d at 1261 (approving of use of *in camera* review by the trial court to determine whether documents contained work product). The trial court can properly excise documents which fall outside of the scope of waiver, and which relate to trial or appellate strategy. Therefore, the trial court's order does not require AMICO to forfeit any legitimate confidential advice and guidance of its counsel.[17] The attorney-client privilege, like any other

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17. In any event, AMICO's rights in the pending appeals obviously have not been prejudiced, since oral argument on the appeals is now scheduled for August 24, 1999 and AMICO has refused to comply in full with the trial court's order which required AMICO to produce all documents relating to the "named insured" issue as of June 1, 1999.

evidentiary privilege, is subject to limitations.[18] If every trial court order which vitiated the attorney-client privilege based upon a *prima facie* showing of fraud were subject to attack on the ground that it denied a litigant its right to counsel and access to the courts, the attorney-client privilege would no longer be subject to *any* qualification, but rather, would be converted into a constitutionally mandated absolute rule.

Finally, although the right to counsel cannot be interfered with arbitrarily, it must yield to a greater public interest in ensuring that an attorney's services are not utilized in furtherance of a fraud. *See, e.g., State v. Charlesworth*, 951 P.2d 153 (Ore. App. 1997). In *State v. Charlesworth*, the court held that application of the state's crime-fraud exception, which resulted in the disclosure of information from defendant's legal file, did not violate the defendant's right to counsel because "[t]hat right depends on an effective attorney-client privilege. The privilege does not extend to communications that come within the crime-fraud exception. The recognition and enforcement of that exception does not violate a defendant's constitutional right to counsel." 951 P.2d at 166.[19] This Court has long recognized that the right to counsel does not include the right to use the services of counsel in furtherance of a fraud. *Nix v. Whiteside*, 475 U.S.

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18. *See, e.g.*, Cal. Evid. Code § 981 (crime-fraud exception to marital communications privilege); Cal. Evid. Code § 997 (crime-fraud exception to physician-patient privilege); Cal. Evid. Code § 1018 (crime-fraud exception to psychotherapist-patient privilege).

19. Nor is the corresponding right of access absolute or unconditional. *See, e.g., Johns v. Town of Los Gatos*, 834 F. Supp. 1230, 1232 (N.D. Cal. 1993) (upholding order requiring litigant to seek permission from the court prior to filing any future suits in light of litigant's history of vexatious litigation).

157, 173 (1986) ("[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury").[20]

In addition, the judgment below does not raise any constitutional questions because it does not conflict with the decisions of this Court or any other state court. The purpose of the attorney-client privilege is to encourage full and frank communications between lawyers and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is well-settled that the attorney-client privilege was *not* designed to encourage those planning to commit a wrong to obtain legal assistance in their endeavor. *See Glade v. Superior Court*, 76 Cal. App. 3d 738, 745 (1978). To protect against such a perversion of the attorney-client privilege, this Court created the crime-fraud exception to the privilege to assure that the " 'seal of secrecy,' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563 (1989) (citation omitted).[21]

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20. In *Nix v. Whiteside*, this Court found that an attorney's threat to withdraw as counsel and expose the defendant's plan to commit perjury did not deprive defendant of the right to counsel. 475 U.S. at 174 ("An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct").

21. *See also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The [attorney-client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told").

Although it is true that this Court has left open "[t]he quantum of proof needed to establish admissibility" under the crime-fraud exception, *Zolin*, 491 U.S. at 565 n.7, it simply cannot be said that the trial court's judgment below was based on insufficient evidence to satisfy the *prima facie* showing of fraud presently required under California law.[22]

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22. The trial court based its ruling on multiple indicia of fraud. *See* Pet. App. at 8a-9a. The following summary of the extensive evidence presented by Montrose irrefutably demonstrates that AMICO knew that Montrose was insured and used the offices of counsel to conceal and misrepresent the material fact of Montrose's status as an insured: AMICO assigned location codes to Montrose facilities under the Stauffer policies and produced a critical "smoking gun" document (which had previously been concealed, while AMICO foisted upon the trial court, Montrose and AMICO's expert a completely inapposite schedule of locations appurtenant to workers' compensation *not* general liability coverage) listing Montrose's two locations on the schedule of locations insured under the Stauffer liability policies; AMICO agreed to duplicate the coverage provided by the prior carrier, INA, coverage which included Montrose; AMICO used Montrose loss history from INA (reflecting Montrose losses) in underwriting the AMICO policies; AMICO used Montrose's loss, payroll, sales and property data in calculating its base premiums; AMICO specifically covered Montrose's automobiles within the Stauffer coverage; AMICO personnel inspected Montrose's facilities; AMICO set massive reserves on Montrose's claims; AMICO paid an earlier Montrose loss without question; and AMICO tried to buy back its coverage from Montrose. The evidence led AMICO's high level coverage investigator Mr. John Noe to conclude in two extensive reports that Montrose readily was covered under the AMICO policies' "named insured" provision. This evidence also led Mr. Richard Wildey, AMICO's chief claims supervisor on this matter, to write that "*[t]he coverage for Montrose flows from the policies issued to Stauffer Chemical.*" Montrose also presented extensive evidence to the trial court that — acting through counsel — AMICO took steps to conceal evidence that Montrose was insured, despite a duty to disclose such information to Montrose, and intended to deceive Montrose through its misrepresentation and concealment.

Moreover, this Court clearly endorsed the *in camera* procedure which the trial court implemented to enforce its order. *Id.* at 572 (noting that *in camera* review "is a [lesser] intrusion upon the confidentiality of the attorney-client relationship than is public disclosure") (citation omitted).

In sum, the trial court's decision is consistent with this Court's precedent which has recognized the validity of the crime-fraud exception, and endorsed the method in which the trial court enforced its order by protecting AMICO's interests and ordering *in camera* review of all documents relating to the "named insured" issue.[23] Accordingly, AMICO's petition for writ of certiorari of the trial court's decision is unfounded.

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23. The trial court's decision is also consistent with the majority of other states, which also recognize the crime-fraud exception to the attorney-client privilege. *See, e.g.*, Alabama (Evid. Rule 502(d)(1)); Alaska (Evid. Rule 503(d)(1)); Arizona (*State v. Fodor*, 880 P.2d 662, 670 (1994)); Arkansas (Evid. Rule 502(d)(1)); Colorado (*Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (1982)); Florida (Evid. Code § 90.502(4)(a)); Georgia (*Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 277 S.E.2d 785, 790 (1981)); Hawaii (Evid. Rule 503(d)(1)); Idaho (Evid. Rule 502(d)(1)); Illinois (*In re Marriage of Decker*, 606 N.E.2d 1094, 1101 (1992)); Indiana (*United States v. Aldridge*, 484 F.2d 655, 658 (7th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974)); Kansas (Evid. Rule § 60-426(b)(1)); Kentucky (*Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 487 (1991)); Louisiana (Evid. Code § 506(C)(1)(a)); Maine (Evid. Rule 502(d)(1)); Maryland (*Fraidin v. Weitzman*, 611 A.2d 1046, 1077 (1992)); Massachusetts (*Purcell v. District Attorney for the Suffolk Dist.*, 676 N.E.2d 436, 439 (1997)); Michigan (*People v. Paasche*, 525 N.W.2d 914, 917-918 (1994)); Minnesota (*Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 515 (1991)); Mississippi (Evid. Rule 502(d)(1)); Nebraska (Evid. Rule § 27-503(4)(a)); Nevada (Nev. Rev. Stat. § 49.115); New Hampshire (Evid. Rule 502(d)(1)); New Jersey (Evid. Rule 26(2)(a)); New Mexico (Evid. Rule 11-503(d)(1)); North Dakota (Evid.

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CONCLUSION

For the reasons set forth above, respondent respectfully requests this Court to deny the petition for certiorari.

Respectfully submitted,

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Rule 502(d)(1)); Ohio (*State ex rel. Nix v. Cleveland*, 700 N.E.2d 12, 16 (1998)); Oklahoma (Evid. Code § 2502(D)(1)); Oregon (Evid. Code § 40.225, Rule 503(4)(a)); South Dakota (Codified Laws § 19-13-5); Texas (Evid. Rule 503(d)(1)); Utah (Evid. Rule 504(d)(1)); Vermont (Evid. Rule 502(d)(1)); and Wisconsin (Evid. Stat. § 905.03(4)(a)).

APPENDIX

APPENDIX — TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DATED NOVEMBER 4, 1998

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55
HON. JOSEPH R. KALIN, JUDGE

No. BC 130486

MONTROSE CHEMICAL CORPORATION,

Plaintiff,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

November 4, 1998

* * *

MS. STRAUSS: Thank you, your Honor.

(Pause on record)

THE COURT: Okay, there are — obviously, the first area that the court has to consider is whether there's a prima facie case for a fraud, and, of course, BP Alaska sets out the four prongs of that, and the court — and I'm sure I'll hear argument on this.

As far as a prima facie case, the evidence tends to point that way, but the four-prong raises an issue, and the four-prong, of course, is that is to Montrose's right to rely upon the representation, Montrose's actual reliance upon the representation. There's some legal issues there that are involved, and, of course, the Worley (phonetic spelling) case comes into that.

The — another area that comes up, and that is assuming that to get that far there were misrepresentations and there was fraud on the — on behalf of AMICO, if you — again to the Worley case, and the Worley case you have a situation where if there are more than one defenses set up by the defense insurance carrier, must each defense be knocked down by the plaintiff, because if any one single defense was a proper defense, then Worley seems to indicate that the fraud exception would not be applicable there, and, of course, in this particular case, there's a further complication, and that is, is that perhaps factually at different times AMICO may probably — I'm going to want the weekend, and I do want to get it out of the way because it's important on where you're going to go in this case, so I'll — you know, I'll rule on it

Monday, and either in your presence or in writing, however you want to do it, but I need the weekend to — after I hear your arguments. But I'm not going to hold onto it for a long time. I think it's important I work on it. That's all we're doing right now anyway.

Go ahead, counsel.

MS. WILKES: Thank you, your Honor. I'll proceed on the four — I believe it's four points that the court raised. But first of all, I'll note that I'm a little disappointed because I have my 22-page outline that I looked at about a million times, and I can go through, of course, all the evidence in laborious detail, none of which has been objected to in the form of any evidentiary objections filed by AMICO, and I'm more than happy to do that. But for now, I'll confine myself to the points that the court raised.

THE COURT: Yes, and I'm not restricting either counsel in terms of time you want to use.

MS. WILKES: And I'm more than prepared to submit on the voluminous papers, which we appreciate the court accepting and reviewing, and all the evidentiary submission. I think it's the kind of thing that's best studied in the quiet of chambers and analyzed, and that really very little Mr. Chesney and I can say back and forth about that evidence would shed any light on — further light on what's there and evident from the record.

Turning to the points that the court raised, the BP Alaska indeed sets forth the four prongs of the prima facie

case, and the fourth prong is reliance, and the court raised the question of what showing Montrose has made on reliance, and first of all, as we pointed out in our papers, the law — and it's set forth in the Cunningham case — is that an insured has the right to rely on representations made by its carrier, and so that's really the concomitant of the insurer's affirmative duty to disclose facts relating to coverage.

And at page 41 of our opening brief we cite a number of authorities relating to that duty. For example, 10 California Code of Regulations, Section 2695.4(a) says, and I quote: (Reading:)

> "Every insurer shall disclose to a first party claimant or beneficiary all benefits, coverage, time limits or other provisions that may apply to the claim."

And then there are a number of additional California cases that we've cited that stand for the proposition that the insurer has the duty to inform the insured of the existence and amount of coverage, even when benefits aren't ultimately payable under the policy. So, for example, the Ramirez case, the Davis vs. Blue Cross case, and several others cited on pages 41 to 42 and note 95.

For example, the Davis vs. Blue Cross says, (Reading:)

> "An insurer has been required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded under the policy."

So in terms of reliance, reliance need not actually be shown, but the insured — to make out this prima facie case — but the insured has the right to rely on the representations that the insured makes — or the insurer makes and just accept those at face value. That's part of the quasi-fiduciary or special relationship that inheres between the insured and the insurer.

THE COURT: Well let me ask this question. If you have a right to rely then, does that — what if Montrose sits there and says, "We don't rely upon this because we know that they're cheating us; fraudulently doing everything bad with us, and we know this"? So are they relying on it?

MS. WILKES: Well — and I think I can see where the court is heading, and that's kind of a question of what duty does the insured have to make its own investigation as opposed to blindly relying on what the insurer says, and if the court looks at the facts in this case, this is in [sic] the situation where Montrose blindly relied on what AMICO was saying. Instead, it went ahead and litigated its rights and established them again and again, and in the face of that, AMICO continued to take the position that Montrose was not insured. So Montrose — Montrose had the right the right to rely and should have been given — and AMICO had the duty to disclose, and Montrose should have been given the correct information, but Montrose still believed that AMICO was wrong and pursued its legal rights. It's done everything that it can to make its position known.

But in addition a lot of the salient facts that evidenced fraud never came out until this case — the

discovery in this case unfolded, and I can give the court a couple of examples.

First of all and this is what really, I think, tipped the scales, was when despite discovery requests in Canadian I and Canadian II and Canadian III, which sought — and would have — should have resulted in the production of this precise information, it wasn't until this case, after your Honor ruled in-camera and it went all the way up through the appellate courts, that Mr. Wildey's memoranda, saying that the coverage for Montrose — the coverage for Montrose flows from the policies issued by Stauffer Chemical — that that document came to light. Now that was a handwritten memo from Mr. Wildey to Mr. Valloy (phonetic spelling) in the home office. No claim of privilege could attach to that whatsoever, and Mr. Wildey wrote on the top of it, "Please pull, REW." A clear intent, right on the face of the document to conceal it, and somebody did pull it, and it wasn't produced in Canadian I ever. So finally in this case, we get that document.

We also in this case get for the first time reserve information which would show that AMICO was heavily reserving both loss and expense reserves on these claims at the very time that it was denying its duty to defend and its duty to indemnify, and reserves, under California law — and we cited the court the cases — those are indicative of a knowledge of the duty to provide coverage. Those are evidence that coverage exists in the mind of the insured or — I'm not saying that clearly. Those show that the insurer knew there was coverage. That's what the California cases say.

But even more importantly, that's what AMICO's own witnesses say. Mr. Huffer testified, "We never set reserves unless there's a duty to indemnify." I mean that's what he said, and here there are these huge reserves. So we received that discovery in this case.

In addition, we learned that AMICO's claims — highest claims officials in their home office had authorized Mr. Wildey to spend nearly $5 million to buy back the coverage from Montrose and Stauffer. Well you don't buy back coverage that you've never given. I mean — so that was another fact.

And then we also learned that counsel for AMICO was advising AMICO that it should have been defending Par Richmond as of 1990. Why would counsel advise to defend a party that they didn't believe was really insured? I mean there are all these things that came to us that coalesce, that brought the fraud to the fore in this case.

And so then Montrose realized that it had been deceived, and as a result of that, went back and pieced together, painstakingly, the history, and we see that indeed when — and this leads me back into all the different elements, which I won't go through, but, for example, one was the only loss run of what should have been scores of loss runs produced and available on all these different policies, all these different claims — only one loss run produced, and mysteriously, that loss run, which had gone to Mr. Kimberly in home office technical claims was copied at askewed angles so the location code for Montrose wasn't on there.

I mean, the picture as one pieces together the components becomes clearer and clearer, but it's not until — it's not until one knows that indeed Mon — that indeed AMICO knew all along that there was coverage — that one could even believe that there would be such fraud.

So I don't know if I've answered the court's question on reliance.

MR. CHESNEY: Your Honor, would you like to argue these one at a time or just have Ms. Wilkes go through all of them.

THE COURT: Probably let her finish them and then pick up.

MR. CHESNEY: Okay. That's fine.

MS. WILKES: The second one, your Honor, let's see, was — oh, the — if there were —

THE COURT: More than one defense brought up.

MS. WILKES: — more than one defense, and that's actually an interesting question that comes out of the Worley case, but I don't think that it raises any issue here, and I'll tell the court why.

As the court knows, there were seven carrier/ insurers. AMICO was one of those seven. A couple dropped off because of financial problems, but they were dealt with as a group in the trial court, the Court of Appeal and the

Supreme Court, and at each level, the courts found that the various defenses that the carriers had asserted to their duty to defend were unmeritorious, vis-a-vis, the duty to defend. They might ultimately be valid defenses, vis-a-vis the duty to indemnify, but the argument is that there is no occurrence or that there was — that the insured expected or intended or triggered coverage, all those things turned on the underlying facts at issue, and they didn't defeat the duty to defend, and the court, having gone through all this, knows this well.

AMICO was in a unique position, however, because in addition to having all those defenses, that little grouping, it had a separate named insured defense, and so when the other carriers lost on those issues and AMICO lost on those issues, AMICO nonetheless kept asserting the named insured defense and saying, "Well, we're different because a duty to defend never arises to a stranger to a contract; therefore, the duty to defend" — and I think that's a debatable proposition in and of itself, but that's an argument for another day. But the point is that AMICO used this one extra defense that it had throughout, from cradle to grave in this litigation, to extricate itself from what was becoming an increasingly disastrous situation for the carriers in terms of the legal rulings that were mounting against them.

And that really segues into the third point, which I think is a subset of the second point, was this defense consistently asserted throughout, or is it one that the court needs to parse time-wise the relevant documents? And absolutely, your Honor, this was a defense that was asserted throughout with, let me say, one qualification. In 1980 — well, the Stringfellow case notice was given around 1982 or

'83, and then Newman and Par Richmond came subsequent to that, so that by 1985, we had interim defense agreements in place and in two of the cases, and then a denial of coverage by AMICO in the Par Richmond case, and at that point in time — and the court can see it from the record — and this is part of the showing of fraud — AMICO had never asserted a named insured defense. They received notice letters and they wrote back and they said, you know, "Well, we're considering it," or, "When you really need a defense, give us a call," but they never said — and they even put on the re line Montrose/Stauffer as the insured. But they never said, "You're not an insured."

What happened is you see an evolution over time. In late-1985, November of 1985, Ms. Gottschalk, of Drinker, Biddle & Reath, writes a letter to Mr. Rotrosen directly, not through counsel, and says, "Mr. Rotrosen, what do you have, what do you do know that would show that Montrose has coverage?" and Mr. Rotrosen writes back, and that was the first time that there was really any hint — she says, "There's a significant question as to whether or not Montrose was a named insured under the policy," and during this time, the internal documents at AMICO were all reflecting that Montrose was indeed an insured. We showed you all those set-up forms where the name of the insured was entered; not the claimant, but the insured, and it was entered and it said Montrose.

And so obviously the people that were filling out the forms at AMICO still thought Montrose was an insured, and it's interesting because Mr. Wildey testified that at the time that set-up form is filled out, there has to be a

determination that there's coverage and they have to have the name of the insured and they have to have the location of the insured, and so clearly that set-up form is not a ministerial thing; it's the first step in setting up the claim file.

But anyway, back to the main point, which is the evolution of this defense. So then pretty much things are quiet; the litigation is filed; there's discovery back and forth in Canadian I.

And then what happens is in 1989, Judge Wisot enters the order on the duty to defend, and all of the sudden then there's a flurry of activity relating to the named insured issue; discovery back and forth, and then the cross-motions are brought.

And I should back up. I skipped a step. In 1986, Mr. Wildey writes a letter to Tom Edwards regarding Par Richmond and says, "AMICO is not going to defend Par Richmond, and here's the six reasons: Number one is Montrose is not a named insured," and then the other five are the standard laundry list of reasons that are given every time an environmental claim is asserted; not an occurrence during the policy period; expected or intended, blah, blah, blah. So at least as of '86, they were thinking about it, but it didn't really become a hot issue, shall I say, until '89 when the duty to defend order, which encompassed Par Richmond, which they were defending, was entered, and then the motions were going back and forth on the named insured issue in '90.

And then in '89, Mr. Wildey's deposition was taken, and the court will remember at that deposition, Mr. Wildey said, "We don't know whether Montrose is an insured or not. Discovery is still ongoing. There's a possibility that Montrose may not be an insured, and so we're not providing coverage." But he said there's — you know, "There's a substantial question and we haven't made a determination one way or another." So they were clearly looking at it.

Now, however, when he's deposed, Mr. Wildey says in this case, "It's been our opinion throughout, the last nine years, that Montrose was not an insured." So whether they were settled in their belief or not at a particular times, this is the issue that's been percolating in the case as AMICO's primary defense since at least '86, when Mr. Wildey — yes, Mr. Wildey wrote his first letter to Mr. Edwards regarding the refusal to defend at Par Richmond. But clearly even before when Ms. Gottschalk wrote her first letter of inquiry, they were already thinking about that, and the court can tell from its own knowledge, as well as the voluminous pleadings that we've included as exhibits, which are only the tip of the iceberg, AMICO has litigated this issue to death. I mean not just in California, but they filed two separate lawsuits in New York while the coverage litigation was pending in California, one of which was after Judge Wisot had made his determination on the duty to defend and the determination that Montrose was a named insured, and they filed a declaratory relief action back to New York seeking an adjudication that Montrose was not insured under the policy, and those pleadings are attached. We have volumes and volumes of appellate pleadings, including declarations signed by counsel under penalty of perjury throughout the '89

through — really up to the present period, saying that AMICO's position is that Montrose was not a named insured under this policy.

So that has been — that has been their number one defense, and it has been the defense that they've used to differentiate themselves from the other carriers and avoid what has been clearly a succession of adverse rulings on the duty to defend, which they have said doesn't apply to them or don't apply to them because they're different because Montrose is not a named insured.

On a last point, your Honor, if the court rules in favor of Montrose, what documents would Montrose be entitled to, I can't find any fault with the court's preliminary indication; AMICO to the attorneys, I believe, yes, that we would be entitled to that. The attorneys to AMICO, I think that those would have to be reviewed by the court in camera because the law is — although AMICO has never brought it out, but the law is that work product privilege is not waived under the crime fraud exception, and I think it would be incumbent upon the court to redact those documents where there was an intermingling of work product material and what would be just purely attorney/client privilege communication, such as transmittal of relevant facts.

I mean everything that I've seen, your Honor, leads me to believe that counsel and client were communicating back and forth on the deficiencies of the named insured defense and the factual weaknesses that they faced, and so I think there would be a considerable amount of communication on that.

Pure work product such as Mr. Brown's internal analysis of the named insured issue, would not be subject to production, but it would be subject to review in camera because it might contain within it facts that were communicated to him by the client. For example, if he said, "Montrose — I think we have a good legal argument that Montrose isn't a named insured, even though Mr. Wildey has told me that the loss runs and the other documents show location codes," then that — there would be certain information in there that would be subject to disclosure on a redacted basis.

And unless the court would like to hear more on those four points, I'll submit on that. But again, if we're going to go through all the factual evidence, I have a lengthy spiel.

THE COURT: Okay. Well, let's argue those and then we'll get back —

MR. CHESNEY: Sure.

THE COURT: — and rebuttal and so forth.

MR. CHESNEY: I think we'll get to a lengthy spiel in due course. I'm sure we will.

Let me try and follow the track of what Ms. Wilkes was saying, but let me begin by not doing that, but instead speaking to the last issue, because I think that is the one that's probably simplest.

THE COURT: Okay.

MR. CHESNEY: I think that the law is pretty clear, and while Ms. Wilkes may not have read our brief, we did bring it to the fore, that the — while the attorney/client may be waived — attorney/client privilege may be waived in a situation of fraud, work product is not, and I think there's no question that a review upon a proper preliminary conclusion by the court, if there may be enough evidence to justify such a review, should take place.

And my only difference with Ms. Wilkes may be that I think that unless the court is prepared to find on the basis of the evidence presented without a hearing that there actually has been fraud, then the court ought to preliminarily review everything to see whether anything, whether it's attorney/client privilege or whether it's work product privilege, can be deemed properly to be supportive of the proposition that some kind of fraud has occurred.

And my last point on that would be that I think, again, to the extent we're talking about attorney work product, particularly, I would be very uncomfortable having a trial court look at that information. I think it should be done by an independent person who is not going to be involved in making rulings in the case which would at least have the potential to be colored by whatever that person might have read in the work product of the attorneys who are trying the case. So that would be my view on the last point.

So I don't think there's a real big difference between us as to which kind of documents would and wouldn't be producible in the case of a proper showing.

THE COURT: Okay.

MR. CHESNEY: If we go back to the first one, with regard to the BP Alaska prongs, the first question is, what would the material fact be that had been misrepresented. Here what we have is are they taking a position, and Ms. Wilkes from the beginning — begins by saying, "Yeah, they took the position on the named insured issue that we weren't insured, but the insurer has an obligation to provide information to the insured relating to coverage."

Well here, if you look at the case law, there isn't any question that both sides new all of the underlying facts relating to coverage, and there wasn't anything that could be materially withheld from Montrose that related to that. They knew the policies as well as we did. Stauffer had the policy, we had the policy. The policy language wasn't secret. There were no facts that were kept secret, no facts that were misrepresented.

THE COURT: What about Nowee coming up with the findings that there was coverage and those were not communicated.

MR. CHESNEY: Well Nowee didn't come up with a finding that there was coverage. Nowee, as part of an investigation, passed on to home office his views.

THE COURT: Right.

MR. CHESNEY: There's no case law in California that says that you have to pass on the view of a particular individual within your organization who takes a particular point of view in analyzing information. Not to pass on a view that you believe to be incorrect is not fraud. There's no case in California that would even remotely say that, that by not passing on John Nowee's opinion, AMICO could be found to have committed fraud in Montrose.

THE COURT: But with regard to your duties to the insured —

MR. CHESNEY: Yes?

THE COURT: — isn't that information that they might be entitled to in order to make their determination and decision whether to proceed with what they're doing, plus all the other information that AMICO may have had with regard to its prior policies, its — how it treated, you know, these issues, and it's — I mean there's a lot of information there, a lot of factual data there as to what AMICO is doing and how they were —

MR. CHESNEY: Well I think we're getting into an interesting area because I — if that's where the court is coming from, then I think the court is coming from a direction that's probably not one that any other court has yet come from in California, because there is no law in California that would suggest that if you have an employee who is charged with a job, goes and does the job, which is part of an overall

assessment of a situation within the company, that you have to provide to your insured every piece of information in terms of the views expressed by all the various individuals up and down the line as part of deciding whether or not you believe you insured them? There isn't any law to that effect. Mr. Nowee's opinion is not a material fact that could be held or withheld.

Now had Mr. Nowee said, "I have a document here and in this document it says — notwithstanding that the language of the policy says, 'Only Stauffer and owned and controlled entities are covered. Notwithstanding that, we're basing our premium on Montrose's payroll and they are covered,' now if we withheld that, that would be fraud.

THE COURT: But didn't you have the information at this point with regard to what premiums were being charged to Stauffer, as to how that related to the number of employees, how that related to the payroll?

MR. CHESNEY: Let me speak to that briefly. That's a very good point, because what the information that we had with relation to the premium is how it was calculated, and let's not forget that the claims that we're talking about arose in the mid-1980s, and at that point, the information we had was in the underwriting file relating to how the premium was calculated, and here's what the underwriting file says, and this is 100 percent accurate representation to your Honor of what the underwriting file says. The underwriting file says, "The basis of the premium calculation for the liability policies will be the workers' compensation schedule premium, plus the payroll from monopolistic state fund states

in which Kemper cannot issue workers' comp insurance to Stauffer or related entities because of the state monopoly."

California was not, and I believe is not, but was not a monopolistic state fund, and in fact some California locations that are covered under the policies reflect the fact that they have workers' compensation insurance. California is where — one of the places for Montrose was. California is not a monopolistic state fund, so Montrose was not used as part of the premium calculation, and that's very clear from the underwriting file. So in terms of what we had from the underwriting file, we had evidence that they were not insured.

Now what did Ms. Gottschalk do about that? Ms. Gottschalk wrote to Mr. Rotrosen and said, "Look, we have a serious question about whether you're insured. Can you please provide us with any information you have that would show us that you are?" So we didn't just kick them out. In fact the big fraud in this motion, your Honor, should be evident to the court if you look at what really happened in these cases.

And let's back up and talk about when Ms. Gottschalk made her first approach. Ms. Wilkes says this was in 1985, and that's correct. But there were no coverage positions taken prior to that time by American Motorists, and the reason was as follows:

In the beginning, the first claims that arose were in connection with the Stringfellow site. Montrose presented those claims to Travelers, and for a long time, indeed a time that became so long that Mr. Mulliken began to be annoyed

about it — Mr. Mulliken being, of course, the senior partner of Latham, who's responsible for Montrose. Travelers took so long in organizing the defense of those cases that Mr. Mulliken began to press buttons and say, "Look, guys, you've got to get going on this." That led to discussions in the fall of 1985 in which American Motorists and other insureds became involved.

In November of that year, Ms. Gottschalk wrote to Mr. Rotrosen and said, "Look, we have an issue here with you folks that we need to address because we think there's a serious problem of whether you're covered. Could you give us any information that you think would show that you are?" Two weeks after writing that letter, American Motorists entered into the interim defense agreement for Stringfellow and Newman. So there's the first case.

In the case presented, or the first cases Stringfellow and Newman, it is demonstrable and undisputed that American Motorists did not withhold participation in the defense of Montrose on the basis of the named insured argument at all. It had a number of coverage disputes with Montrose, of which that was one, but it didn't withhold it on that basis, and if you go on down the line, there are no coverage disputes in which American Motorists withheld coverage from Montrose solely on the basis of the named insured argument.

Ms. Wilkes gets up and blithely tells you they tried to use this argument in order to distinguish themselves from other people. Well of course we did, because it does distinguish us from other people, because in our view, there

is a very real issue as to whether we insure Montrose. That isn't an issue with Travelers and INA and so forth. But did it make any difference to what actually happened? No, it did not, because if you look at every other case, other than Par Richmond — and I'll get to Par Richmond in a moment — if you look at every other case other than Par Richmond, you will find that we paid when the other people paid, and indeed it's within your Honor's own judicial knowledge that in the case of Alderman and in the case of what we sometimes call NOAA, that is U.S. v. Montrose, let's call the cases underlying Canadian II and Canadian III, in both of those cases, when your Honor originally summarily adjudicated the duty to defend in favor of Montrose, the carriers were already paying Montrose's defense, number one; number two, American Motorists petitioned for review of your adjudication as it related to the named insured issue. Your Honor was reversed, your order was vacated, there was no order requiring American Motorists to pay, and American Motorists paid all the way through.

Until April of this year, there was no order at all in Canadian II, the U.S. v. Montrose case, requiring American Motorists to pay, because they never brought a motion on the named insured issue in that case until early this year, and again, all the way through, American Motorists paid the defense. So the idea that there was some kind of fraud being perpetrated by the presentation of a named insured argument is a joke.

Now with regard to Par Richmond, there were a number of reasons why American Motorists believed that Par Richmond was absolutely not a covered claim, and it

was distinguished from the other claims involved here, not so much by the named insured issue, which is present in all, but by other factors related to the characteristics of that claim, which American Motorists believed made it clearly uncovered, and I still believe that right, by the way, in the sense that I think the decision that they made at the time was a correct decision.

But the basic point, your Honor, is that while American Motorists has consistently asserted the named insured defense, American Motorists has never withheld benefits from Montrose exclusively on that basis, has in fact demonstrably provided money to Montrose for the defense of cases before there was any adjudication of a named issue through the IDA agreement in Stringfellow and Newman, and has provided money for the defense of the underlying cases in Canadian II and Canadian III before there was any adjudication in those cases either.

Now that really ought to, frankly, without more dispose of this fraud nonsense, but I'm sure it won't, so let me go on.

If your Honor has any questions about those points, I'll be happy to —

THE COURT: Go ahead, I'm making good notes.

MR. CHESNEY: Thank you.

Now the next thing that Ms. Wilkes talked about were these so-called salient facts that became uncovered only

during the course of this litigation. One of her examples — and this is the problem I have with Ms. Wilkes, because your Honor is presented with stuff that's supposedly factual and then you're asked to make decisions on it, and since your Honor has to make decisions on something, you know, I have to assume you're paying attention to what she says. She says, "We suddenly find out that buy-backs of up to five million were being proposed." Oh, wow. Buy-backs were being discussed in 1989 and 1990. I know because I was there, and your Honor should know because it's in the record because Mr. Mulliken talks about it in his deposition that these things were being discussed in 1990. So how can Ms. Wilkes get up and even say to the court, "We didn't know about these things until after we filed this bad faith case and got discovery in this case"? It's a disgrace.

THE COURT: Are you referring —

MR. CHESNEY: It's a disgrace.

THE COURT: — to the discussions on buy-back or the money that was put aside with regard to the amount of the buy-backs?

MR. CHESNEY: Well your Honor's doing your best to help her out, but what she said is that, "We didn't these buy-back things until this point."

Now as far as the other issue, if you're talking about the reserving question —

THE COURT: Well the reserves is different than the buy-back, I would assume.

MR. CHESNEY: Well if it's different, that's fine then. I was talking the buy-back discussions, which took place in — and Mr. Mulliken was there. I was there. There's nothing wrong with buy-back discussions.

THE COURT: Well, no, the issue that I — you're saying the buy-back was discussed in the early '90s —

MR. CHESNEY: Right.

THE COURT: — and my question was it as an esoteric discussion or was it actually money discussed to the point where AMICO was saying, you know, "We'll pay this much."

MR. CHESNEY: Yes, that was discussed and Mr. Mulliken testified to that.

THE COURT: The $5 million.

MR. CHESNEY: I don't think that was the figure. I think it was more like three that he testified to at that time. That's my recollection of his testimony.

THE COURT: Okay, but —

MR. CHESNEY: On the basic issue, yes, the numbers were discussed. Absolutely they were discussed. We couldn't very well talk about it without discussing the numbers.

Now Ms. Wilkes says, "This proves that they knew they insured Montrose." Well that's kind of a odd argument

to me because it's certainly not something that the court could properly infer because the discussions never involved Montrose alone. They involved our actual insured, Stauffer. But if we're going to buy back the policies, we have to buy back any potential claims that are going to be forthcoming, and Montrose was sitting out there and making claims against us. So they had to be involved in those discussions. There wasn't any other way to buy back the policies with any security for American Motorists since Montrose was continuing to sue under them. So it doesn't suggest that we insured them; it suggests we were trying to solve the problem if we could by a universal buy-back of the claims.

Now, then Ms. Wilkes says, "The reserve information is indicative of the fact that they knew they insured us all the time, and that shows that they were engaged in some kind of fraudulent conduct." Well again, that too is complete nonsense, because as we have shown in our papers, the actual reserve information that's in there reflects a whole bunch of different things, which Montrose is at pains to confuse and not separate, and those things are: Number one, that a number of the figures that they refer to involve all claims made by Stauffer and Montrose; number two, the defense or expense reserves are adjusted from time to time to reflect actual costs that have been incurred or that are anticipated reasonably to be incurred in the near future due to one of a couple of things. One would be the IDA in Stringfellow and Newman. If you're party to an IDA, you know you're incurring defense costs and you know you're going to incur defense costs, and therefore, you have reserves.

Now the IDA, by its terms, explicitly reserved to all the parties the coverage positions, including the position

that we don't insure you folks at all. That's why the coverage litigation had to take place, because all of those issues were reserved. But meantime, we were paying. Now after the affirmance of Judge Wisot's order, that had to be done also because there was an outstanding order that required us to make payments in the Canadian I cases, and so you had to have reserves to reflect the fact that you were making those payments. It's legally required. You can't just pay money and say, "Well, it didn't go anywhere. I don't need to reserve for it, and I'm not going to reserve for the money that the court says I have to pay." That's not evidence we know we insured Montrose; it's evidence that Judge Wisot was affirmed, and as the Court of Appeals said in the appeal from your Honor's decision in the Canadian III case, the affirmance of Judge Wisot's order was done in such a manner that it didn't permit for and didn't allow of and didn't involve the appeal of the named insured issue, which was a quite separate issue.

Excuse me, your Honor. If I may.

(Pause on record)

MR. CHESNEY: Now the last —

THE COURT: Incidentally counsel, with regard to the time elements, if you want to go through or if you want to take a break for anything, just let me know.

MS. WILKES: Thank you, your Honor.

It's up to you, John.

MR. CHESNEY: No, I just had a frog in my throat for a minute.

MS. WILKES: Yes, whatever you're comfortable with.

MR. CHESNEY: I have removed the amphibian in question and I'm ready to continue.

The last piece of damning evidence that Ms. Wilkes referred to was a handwritten note scribbled by Mr. Wildey to Mr. Valloy, and on it he does — the language does say he's sending to Mr. Valloy a report from counsel on claims being made by Stauffer and Montrose, and in his scribbled note he says the coverage for Montrose flows from — or something — grows out of the Stauffer policies. Now what he should have said, obviously, was the claims by Montrose grow out of those policies. He used the word coverage. They say this is proof that Wildey knew all along that American Motorists insured Montrose. That is about the most laughable contention as a basis for fraud I have ever heard in my life, and let me tell your Honor why.

First, it's a scribbled internal note attaching another document. Second, it's Mr. Wildey writing to the home office examiner who was monitoring the claim at the time.

Now, does anyone in his right mind really believe that if Mr. Wildey had done an about-face on the position of coverage that Kemper was taking there wouldn't have been one whole hullabaloo, and does anyone really believe that Mr. Wildey is going to advise Mr. Valloy that Montrose is covered in a casual scribbled note when for years we've been

arguing that Montrose is not an insured? It begs for credulity. Now, with regard to indemnity rights, or indemnity reserves, which were something else that Ms. Wilkes mentioned, with regard to the issue of indemnity reserves, the reserves that Montrose is seeking to suggest to the court are reserves for indemnity obligations are no such thing. They are reflected as reserves for possible settlement — overall global settlement of the outstanding claims through the buy-back of policies, and again, whether or not that was a proper way to reserve would be one issue, but what it in fact was is not an issue. What is [sic] was was a reserve that was established to reflect the ongoing discussions that it was thought at the time might lead to a global resolution of the claims. So there are no indemnity reserves as such established.

I just want to make sure I let your Honor make the notes before I —

THE COURT: No, no, keep going.

MR. CHESNEY: — proceed to the next issue.

Then your Honor talked about the Worley case, and I heard Ms. Wilkes say an awful lot of things, but I'm not really sure she said anything that relates to the Worley case, because AMICO has all along asserted a number of defenses to the claims that Montrose has asserted, and as she says, it has indeed been consistently asserted. It was asserted or raised as an issue before the initial IDA in Stringfellow was entered into, and it's been asserted ever since, and interestingly enough, although your Honor is now asked to conclude that American Motorists have advanced this

defense fraudulently, the Court of Appeals hasn't yet decided whether it's an issue that needs to be tried. It hasn't yet been finally decided by any court in the country.

When Montrose says that we are extremely stubborn because we continue to litigate this issue, well, I have never heard anyone draw an inference of fraud against a party on the basis that they have appealed a decision. So it can't be the fact that we continue to litigate it. That has to stand independently to the side and Montrose has to show extraneously to that fact fraud. You can't say it's fraud to appeal a trial court decision, even from a judge as distinguished as your Honor. That's a right that a party has and properly exercises.

Now as to the Worley case again, there are a whole number of different defenses that have been asserted, and to the extent there is no evidence that there was an entire array of fraudulent defenses, I think that's a problem that they can't surmount, and I haven't yet heard Ms. Wilkes say anything at all about how they go about surmounting that one. Now there are a number of things here that I'll just mention as pick-ups because these really, again, are things, your Honor, which I believe go to the heart of the matter, which is that Montrose comes in here repeatedly, makes assertions through its counsel to the court which are not supported properly by evidence and then asks the court — and I regret to say has done so with more success than I think would make me happy — but ask the court to make decisions based on these wild assertions. For example, it says that American Motorists, as Ms. Wilkes put it, never raised a named insured issue until 1985. Well, there were no raising of any issues by anyone

until 1985 because as I said earlier, Travelers was supposed to be handling the putting together of the defense of the Stringfellow and Newman cases, and only once it became clear to Mr. Mulliken that Travelers was falling down on the job did other carriers start to be involved directly in those discussions.

Then Ms. Wilkes testifies as to what Mr. Wildey said with regard to set-up of claims, and she testified inaccurately, and I would like to cross-examine her on the untruthfulness of her testimony to the court under the guise of argument. How do I do that? She says in 1989 all of the sudden in Par Richmond Mr. Wildey writes and says, "Hey, we have a named insured problem with you guys and Par Richmond. This is a new deal." Well, how do I cross-examine her on the untruthfulness of that testimony? I guess that one, I don't need to because the fact of the matter is if the court would take a look at the pleadings, you will find that it was raised in the initial pleadings in the Par Richmond case. It's been raised in every pleading American Motorists has ever filed. Every single pleading.

I think I'll leave it there for now, unless the court has any argument, because I did — any other questions, because I did speak to the last issue that was addressed by the court first. Maybe now we can proceed to the next issue.

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